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No. 96-568

In the Supreme Court of the United States

OCTOBER TERM, 1996

JOSEPH ONCALE, PETITIONER

v.

SUNDOWNER OFFSHORE SERVICES, INCORPORATED, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, protects employees from sexual harassment regardless of whether the employee and the harasser are of the same sex.

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INTEREST OF THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, prohibits discrimination in employment because of an individual's sex. The Equal Employment Opportunity Commission (EEOC) was established by Congress to interpret and enforce Title VII. The EEOC participated as amicus curiae in this case in the court of appeals.

The Attorney General is responsible for enforcing Title VII in cases in which the employer is a government, a governmental agency, or a political subdivision. 42 U.S.C. 2000e-5(f)(1). The United States, in its capacity as employer and otherwise, has a strong interest in ensuring the fair and balanced enforcement of the federal civil rights laws. In response to the Court's order inviting the Solicitor General to express the views of the United States, the Solicitor General filed a brief on behalf of the United States and the EEOC suggesting that the petition for a writ of certiorari be granted.

STATEMENT

1. Petitioner, Joseph Oncale, was employed by respondent Sundowner Offshore Services, Inc. (Sundowner), on an offshore oil rig from August to November 1991. Pet. App. 2. He filed the instant suit in the United States District Court for the Eastern District of Louisiana against Sundowner, his direct supervisor John Lyons, and two co-workers, Danny Pippen and Brandon Johnson. The complaint alleged that respondents had subjected petitioner to sexual discrimination and harassment in employment practices, and consequently had forced him to resign, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* Pet. App. 1. Petitioner alleged that he had been subjected both to a discriminatorily hostile work environment and to *quid pro quo* harassment because of his sex. His complaint recited three specific instances of physical sexual harassment. *Ibid.*

Discovery proceeded and respondents moved for summary judgment, contending that, under Fifth Circuit precedent, petitioner's claim was not actionable

under Title VII because petitioner was of the same sex as the alleged harassers. J.A. 27, 33 (citing *Garcia* v. *Elf Atochem North America*, 28 F.3d 446, 451 (1994); *Giddens* v. *Shell Oil Co.*, No. 92-8533 (Dec. 6, 1993) (unpublished)). Respondents acknowledged that claims of *quid pro quo* sexual harassment have been brought successfully in some district courts under Title VII where the employee was male and the supervisor was a male homosexual, but respondents contended that was not the case here. J.A. 35-36. Respondents also contended that, in any event, petitioner could not make out a prima facie case of hostile work environment harassment because respondent Sundowner employed only males on the platform where petitioner worked. J.A. 34. Respondents submitted evidence that Sundowner did not employ any females on its rigs. J.A. 41.

Petitioner opposed summary judgment, contending that there is no blanket prohibition to recovery under Title VII "by a male employee who is sexually harassed by other male employees who control the terms, conditions and duration of [his] employment while a fully informed [supervisor] take[s] no action." J.A. 46. Petitioner submitted his sworn testimony that, on or about October 25, 1991, his supervisor Lyons physically assaulted him by placing his exposed penis on petitioner's head while Pippin held petitioner down and Lyons told petitioner that he was going to "fuck [petitioner] in [his] behind." J.A. 76; see also J.A. 20. Immediately after the incident, he informed a supervisor about the harassment, but the supervisor took no action. J.A. 77. The following day, Johnson held him down while Lyons placed his exposed penis on petitioner's arm. J.A. 76; see also J.A. 20. Johnson himself testified that he had picked petitioner up, grabbed

him, and was holding him when Lyons told him to hold petitioner there and threatened that he was going to expose his penis and put it on petitioner. J.A. 83, 84. Johnson testified that he let petitioner go, however, so that Lyons did not carry out that threat. J.A. 83, 84. Petitioner testified that while he was taking a shower Pippin and Lyons got in with him and Pippin lifted petitioner up and folded him over while Lyons "rubbed a bar of soap between [his buttocks] and told [him], 'Yeah, we know you talked to daddy about it, but we're going to fuck you anyway.'" J.A. 67; see also J.A. 20. Petitioner testified that he believed his supervisor Lyons intended "[t]o have sex with [him], to rape [him]." J.A. 70. When petitioner returned to work after a few days off, he was again sexually harassed by verbal sexual advances, predominately from Lyons, including threats of anal intercourse. J.A. 72-73. He again told supervisors about the advances, but nothing was done. J.A. 73. Petitioner resigned, stating on the separation form that he quit because of sexual harassment. J.A. 79-80.

2. The district court granted respondents' summary judgment motion and dismissed petitioner's claim. Pet. App. 10-15. Citing *Garcia*, *supra*, as binding circuit precedent, the district court ruled that petitioner, "a male, has no cause of action under Title VII for harassment by male co-workers." *Id.* at 14.[1]

3. The court of appeals affirmed. Pet. App. 1-7. Although it acknowledged that the analysis in *Garcia*

[1] The district court also found that respondents Pippin and Johnson could not be considered petitioner's employer. Pet. App. 14, 15 n.4. Although petitioner describes Pippin as his de facto supervisor (Pet. 4, 5), he has not sought this Court's review of that issue.

had been "rejected by various district courts," *id.* at 4 & n.2, the court concluded that the prior panel decision was binding precedent, and "bar[red] all same-sex sexual harassment claims" under Title VII, *id.* at 5-6.

SUMMARY OF ARGUMENT

Title VII's coverage is sex-neutral. It protects employees from discrimination because of sex regardless of the gender of the employer or employee. Title VII affords such protection to both men and women, *Newport News Shipbuilding & Dry Dock Co.* v. *EEOC*, 462 U.S. 669, 682 (1983), and the Court has never suggested that protection depends on whether the harasser and the employee are of opposite sexes.

There is no exemption from Title VII's sex-neutral coverage for cases of sexual harassment. That is, Title VII's protection against discrimination in the form of sexual harassment does not depend on whether the harasser and employee are of opposite sexes, so long as the discrimination by the employer is "because of [the employee's] sex." The court of appeals' contrary ruling, categorically excluding any Title VII sexual harassment claims involving an employee and harasser of the same sex, is contrary to the plain language of the statute, the longstanding and consistent interpretation of the Equal Employment Opportunity Commission (EEOC), and the approach of the other circuits that have considered the issue.

In light of the erroneous legal standard underlying the entry of summary judgment below, the judgment should be reversed and the matter remanded for further proceedings. Neither the fact that peti-

tioner's harassers may not have been motivated by homosexual attraction, nor the fact that petitioner worked at an all-male worksite, automatically forecloses his claim that he was subject to a discriminatorily hostile work environment or to *quid pro quo* harassment because of his sex.

ARGUMENT

TITLE VII'S PROHIBITION AGAINST SEXUAL HARASSMENT THAT CONSTITUTES SEX DISCRIMINATION IN THE WORKPLACE PROTECTS ALL EMPLOYEES, REGARDLESS OF THE SEX OF THE HARASSER OR EMPLOYEE

1. The sole legal question presented in this case can, and should, be decided by reference to the plain text of the governing statute. Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, § 703(a), 78 Stat. 255, states, in relevant part, that "[i]t shall be an unlawful employment practice for an employer"

> to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. 2000e-2(a)(1). On its face, this provision prohibits all who meet the statutory definition of the term "employer" (42 U.S.C. 2000e(b)) from discriminating against either male or female employees "because of" any of the statutory factors—race, color, religion, sex, or national origin.

The Court has repeatedly recognized that Title VII's coverage is sex-neutral and cannot be interpreted to protect one sex of employees, but not the other, from discrimination because of sex. In *Newport News Shipbuilding & Dry Dock Co.* v. *EEOC*, 462 U.S. 669, 682 (1983), the Court quoted the text of Title VII and unequivocally concluded: "Male as well as female employees are protected against discrimination." *Ibid.*[2] The Court explained that, as in a case involving a female employee, an employment practice violates Title VII's "simple test" of discrimination if it treats a male employee "in a manner which but for that person's sex would be different." *Id.* at 683 (quoting *City of Los Angeles Dep't of Water & Power* v. *Manhart*, 435 U.S. 702, 711 (1978)). Cf. *McDonald* v. *Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976) (holding that Title VII prohibits racial discrimination in employment against white persons as well as against nonwhites).

On its face, Title VII's sex-neutral prohibition against sex discrimination is not limited to discrimination by the opposite sex. It would have been a simple matter for Congress to limit the reach of Title VII to discrimination between members of opposite sexes by use of that phrase if that had been its intention. See, *e.g.*, 29 U.S.C. 206(d)(1) (Equal Pay Act generally prohibits employer from paying wages to employees at rate less than rate employer pays

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[2] The Court also noted that, although an amendment to Title VII had clarified its applicability to pregnancy, that amendment "did not remove or limit Title VII's prohibition of discrimination on the basis of the sex of the employee—male or female—which was already present in the Act," *i.e.*, from the time of enactment. *Newport News*, 462 U.S. at 675-676 n.11.

to "employees of the opposite sex" for equal work); 38 U.S.C. 101(3) and (31) (defining surviving spouse and spouse as a member of the opposite sex).

There is no validity to respondents' suggestion (Br. in Opp. 10) that Title VII does not apply to same-sex discrimination because members of the same sex cannot discriminate against each other because of sex. As this Court recognized in the context of racial discrimination, "[b]ecause of the many facets of human motivation, it would be unwise to presume as a matter of law that human beings of one definable group will not discriminate against other members of their group." *Castaneda* v. *Partida*, 430 U.S. 482, 499 (1977). See also *id.* at 503 (Marshall, J., concurring) ("Social scientists agree that members of minority groups frequently respond to discrimination and prejudice by attempting to disassociate themselves from the group, even to the point of adopting the majority's negative attitudes towards the minority. Such behavior occurs with particular frequency among members of minority groups who have achieved some measure of economic or political success and thereby have gained some acceptability among the dominant group.") (citations omitted); *id.* at 515-516 & n.6 (Powell, J., dissenting, joined by Burger, C.J., and Rehnquist, J.) (favoring inference that members of a group do not discriminate against themselves, but rejecting suggestion "that persons in positions of power can never be shown to have discriminated against other members of the same ethnic or racial group"). The Court thus long ago declared invalid the behavioral presumption "that human

beings would not discriminate against their own kind." *Id.* at 500.[3]

The Court has never suggested that an employee cannot bring a Title VII sex discrimination action if the discriminator is of the same sex. To the contrary, in *Johnson* v. *Transportation Agency*, 480 U.S. 616 (1987), a Title VII claim was brought by a male employee who claimed he had been discriminated against because of sex when a female employee was selected for a promotion instead of him. The supervisor who made that promotion decision was male, *id.* at 624-625, as were the overwhelming majority of the employer's officials, administrators, and professionals, *id.* at 621. Although the Court ultimately ruled against the male employee because it concluded that the challenged employment decision had been made pursuant to a valid affirmative action plan, the Court analyzed the claim without any suggestion that such a same-sex discrimination claim was not cognizable under Title VII. *Id.* at 626-642.

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[3] Moreover, same-sex discrimination may be motivated by a variety of reasons other than animosity, and Title VII prohibits such discrimination regardless of the underlying motive. For example, in *Manhart*, *supra*, the Court invalidated, on Title VII grounds, a pension system that presumably had been motivated by a desire to benefit women as a group, but which treated individual women differently from men. In *International Union, United Auto. Workers* v. *Johnson Controls, Inc.*, 499 U.S. 187, 200 (1991), the Court held that a policy that excluded women with child-bearing capacity from lead-exposed jobs violated Title VII, as amended to prohibit pregnancy discrimination, despite the ostensibly benign interests that had motivated it. Cf. *Cleveland Bd. of Educ.* v. *LaFleur*, 414 U.S. 632 (1974) (striking down, on due process grounds, law that required women to take maternity leave).

2. Sexual harassment in the workplace constitutes employment discrimination in violation of Title VII if a supervisor makes "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature," and submission to such conduct is made "explicitly or implicitly a term or condition of an individual's employment," or is "used as the basis for employment decisions affecting such individual." 29 C.F.R. 1604.11(a)(1) and (2) (*quid pro quo* harassment). Also, sexual harassment in the workplace constitutes employment discrimination under Title VII if "such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." *Meritor Savings Bank, FSB* v. *Vinson*, 477 U.S. 57, 65 (1986) (quoting 29 C.F.R. 1604.11(a)(3) (hostile work environment harassment)).

There is no exemption from Title VII's sex-neutral coverage for cases in which discrimination takes the form of sexual harassment. In *Vinson*, 477 U.S. at 64, the Court unambiguously declared that, "[w]ithout question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex." In rejecting the argument that Title VII should cover sexual harassment cases only if there is economic or tangible loss, the Court analyzed the coverage of Title VII and sexual harassment claims in wholly sex-neutral terms. The Court emphasized that the fact that Title VII is phrased as a prohibition against discrimination in the "'terms, conditions, or privileges of employment' evinces a congressional intent 'to strike at the entire spectrum of disparate treatment of *men and women*' in employment." *Ibid.* (emphasis added) (citations omitted). The Court quoted with approval a lower court's conclusion that subjecting members of either sex to sexual harassment violates Title VII: "Surely, a requirement that a *man or woman* run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets." *Id.* at 67 (quoting *Henson* v. *City of Dundee*, 682 F.2d 897, 902 (11th Cir. 1982)) (emphasis added). The Court also found guidance in the EEOC's sex-neutral guidelines defining sexual harassment as a form of sex discrimination prohibited by Title VII. *Id.* at 65 (quoting guidelines' definitions at 29 C.F.R. 1604.11(a)).

When the Court again addressed the definition of a discriminatorily abusive work environment under Title VII, in *Harris* v. *Forklift Systems, Inc.*, 510 U.S. 17 (1993), it again spoke of Title VII's coverage of sexual harassment claims in wholly sex-neutral terms. It repeated *Vinson*'s declaration that Title VII had been enacted to "strike at the entire spectrum of disparate treatment of *men and women* in employment." *Id.* at 21 (emphasis added) (citations omitted). Moreover, the Court recognized the serious consequences sexual harassment may have on an employee's career—without any suggestion that the existence of injury from such harassment in the workplace, or Title VII's availability to eradicate it, depends in any way upon the sex of the employee or harasser. To the contrary, the Court described the universal protection of Title VII for all employees against harassment that alters their working condi-

tions based on any of the statutorily proscribed factors:

> A discriminatorily abusive work environment, even one that does not seriously affect employees' psychological well-being, can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers. Moreover, even without regard to these tangible effects, the very fact that the discriminatory conduct was so severe or pervasive that it created a work environment abusive to employees because of their race, gender, religion, or national origin offends Title VII's broad rule of workplace equality.

Id. at 22.

There are a myriad of examples of employment discrimination involving members of the same sex, in both the harassment context and otherwise, that clearly are prohibited by Title VII. Consider, for example, a male supervisor who conditions a male employee's promotion on his agreement to date the supervisor's daughter. Or, to place this example in the harassment context, assume the employee refuses to date the daughter and the supervisor launches a campaign of harassment against the employee, including unrelenting sexual taunts and innuendos in front of co-workers and a flood of sexually explicit materials at his workplace. In both instances, the supervisor discriminates against the employee with respect to terms and conditions of employment because of that employee's sex. The harm inflicted on the employee is no different, and the discrimination no less evident, than if the supervisor had been a woman with a daughter.

Consider alternatively the example of a female supervisor who believes it will advance her career if she aligns herself with the male-dominated management force rather than her female subordinates; consequently, her evaluation reports on female subordinates deliberately do not reflect the high quality of their work. Or, to place the example in the harassment context, assume she harasses the female subordinates by severe and pervasive sexually explicit intimidation and ridicule, in front of other employees, intending that it will interfere with, and lower the quality of, the female subordinates' work. Again, the discrimination based on sex in those circumstances is no less evident or damaging than if the supervisor had been a man who altered his evaluation reports of female subordinates or sexually harassed them because of his belief that women do not belong in the workplace.

The irrelevance of the sex of a harasser is most obvious when one considers that a hostile work environment claim may arise, for example, either from (a) harassment by an anonymous co-worker which the employer refuses to investigate or remedy (*e.g.*, an unrelenting barrage of sexually denigrating graffiti on an employee's locker, daily posting of sexually explicit cartoons involving the employee), or (b) harassment that is aimed at someone other than the employee who brings the claim (*e.g.*, against other employees or customers).[4] When the *Vinson* Court first

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[4] For examples of hostile work environment cases including anonymous harassment and harassment aimed at others or at the workplace generally, see, *e.g.*, *Andrews* v. *City of Philadelphia*, 895 F.2d 1469, 1482, 1483-1486 (3d Cir. 1990) (reversing district court rejection of Title VII claim that work environment was "so heavily charged with sexism that it was

discussed Title VII's coverage of hostile work environment claims based on sexual harassment, it quoted with approval *Rogers* v. *EEOC*, 454 F.2d 234 (5th Cir. 1971), cert. denied, 406 U.S. 957 (1972), which, the Court explained, had held "that a Hispanic complainant could establish a Title VII violation by

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intimidating, hostile, and offensive," in part because district court failed to give appropriate consideration to conduct other than explicit sexual advances toward the employees, including conduct such as use of terms derogatory and insulting to women generally and anonymous posting of pornographic pictures aimed both at particular plaintiffs and in common areas); *Waltman* v. *International Paper Co.*, 875 F.2d 468, 477 (5th Cir. 1989) (reversing grant of summary judgment in employer's favor, based on evidence that included pervasive anonymous sexual graffiti, and noting that, "[a]lthough not all the graffiti was directed at [plaintiff], it is all relevant to her claim"; other relevant evidence not aimed directly at plaintiff included posting of pornographic drawings and display of used tampons, *id.* at 471; another female worker allegedly was promoted over plaintiff "because she tolerated and, perhaps even encouraged, her fellow workers' sexual behavior," *id.* at 473); *Robinson* v. *Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1493-1494, 1495 (M.D. Fla. 1991) (judgment for Title VII plaintiff based not only on evidence of conduct aimed directly at plaintiff, but also on evidence of pervasive posting, often surreptitiously and thus anonymously, of graffiti and nude and partially nude photographs of women in "sexually suggestive or submissive poses" throughout workplace such that it constituted "a visual assault on the sensibilities of female workers * * * that did not relent during working hours"); cf. *Walker* v. *Ford Motor Co.*, 684 F.2d 1355, 1358-1359 (11th Cir. 1982) (Title VII claim of hostile work environment because of racial harassment based on evidence not only of racial epithet against employee but also of repeated and continuous use of term "nigger" and other racially abusive language to refer to customers and for other purposes at workplace); see also 2 EEOC Compl. Man. § 615.3(a)(3) (Oct. 1981).

demonstrating that her employer created an offensive work environment for employees by giving discriminatory service to its Hispanic clientele." *Vinson*, 477 U.S. at 66. The Court went on to quote *Rogers* as follows:

> [T]he phrase "terms, conditions or privileges of employment" in [Title VII] is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination. . . . One can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers.

Ibid. (quoting *Rogers*, 454 F.2d at 238). The Court observed that subsequent cases had applied that principle to harassment based on race, and "[n]othing in Title VII suggests that a hostile environment based on discriminatory sexual harassment should not be likewise prohibited." *Ibid.*; see also *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 178-181 (1989) (explaining that, in *Vinson*, the Court implicitly approved applicability of Title VII sexual harassment standards to hostile work environment claim based on racial harassment).

Thus, the relationship between the employee and the person creating the hostile work environment is not the focus of the cause of action. Rather, the focus of the prohibition against hostile work environment sexual harassment is on "the relationship between an employee and his working environment." *Rogers*, 454 F.2d at 238. The sex of the harasser matters not at all "[w]hen the workplace is permeated with 'discriminatory intimidation, ridicule, and insult,' * * * that is

'sufficiently severe or pervasive to alter the conditions of the victim's employment,'" because of his or her sex. *Harris*, 510 U.S. at 21 (quoting *Vinson*, 477 U.S. at 65, 67).

3. The Fifth Circuit's holding is contrary to the EEOC's longstanding and consistent interpretation. The EEOC has long recognized that harassment on the basis of sex is a violation of Title VII. In 1980, it determined that there was a need for guidelines because sexual harassment "continue[d] to be especially widespread." 45 Fed. Reg. 25,024 (1980). Shortly after promulgation of those regulations (published at 29 C.F.R. 1604.11), the EEOC was called upon to resolve a claim of same-sex sexual harassment. In January 1981, the EEOC reaffirmed its "long standing position * * * that Title VII does not cover discrimination which occurs because of an individual's sexual preference," but it recognized that claims of same-sex harassment were not precluded where the harassment could be shown to be because of an individual's sex. EEOC Dec. No. 81-16 (Jan. 1981), reprinted in EEOC Dec. (CCH Employment Practices Guide) ¶ 6756, at 4796 (1983 ed.). The EEOC emphasized that, under Title VII, "a discriminatory practice is unlawful when it occurs because an individual is male or female," and it concluded that, if the complaining employee, a male, had submitted sufficient evidence to support his claim that he had been laid off because he had rejected the unwanted sexual advances of his supervisor, a male, Title VII would have been violated and the employer would have been responsible for the actions of the supervisor. *Id.* at 4796-4797. Soon thereafter, in its Compliance Manual's directives regarding sexual harassment, the EEOC further specified:

> The victim does not have to be of the opposite sex from the harasser. Since sexual harassment is a form of sex discrimination, the crucial inquiry is whether the harasser treats a member or members of one sex differently from members of the other sex. The victim and the harasser may be of the same sex where, for instance, the sexual harassment is based on the victim's sex (*not* on the victim's sexual preference) and the harasser does not treat employees of the opposite sex the same way.

2 EEOC Compl. Man. § 615.2(b)(3) (Oct. 1981) (citing EEOC Dec. No. 81-16 (Jan. 1981)).

Like the EEOC's sexual harassment guidelines on which *Vinson* relied, the EEOC's 1981 decision and subsequent compliance directive on same-sex sexual harassment, "while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Vinson*, 477 U.S. at 65 (quoting *General Elec. Co.* v. *Gilbert*, 429 U.S. 125, 141-142 (1976)). As a longstanding agency interpretation, the EEOC's interpretation is entitled to particular deference. See *Brown* v. *Gardner*, 513 U.S. 115, 122 (1994) (citing *Zenith Radio Corp.* v. *United States*, 437 U.S. 443, 450 (1978)); *Nashville Gas Co.* v. *Satty*, 434 U.S. 136, 142-143 n.4 (1977). See also *EEOC* v. *Arabian American Oil Co.*, 499 U.S. 244, 257 (1991) (deference afforded EEOC guidelines depends on, *inter alia*, the "consistency with earlier and later pronouncements") (quoting *Gilbert*, 429 U.S. at 142).

4. In light of the plain, unambiguous text of Title VII, this Court's consistent interpretation of that text as sex-neutral with regard to the statute's coverage, and the EEOC's longstanding and consistent interpretation of Title VII to the same effect,[5] the Fifth Circuit erred in holding that Title VII "bar[s] all s... e-sex sexual harassment claims." Pet. App. 5. All other courts of appeals that have considered the issue have either explicitly rejected such a blanket prohibition, or have suggested or implied that they would.[6]

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[5] The Court has noted the limited legislative history surrounding enactment of Title VII. See *Meritor Savings Bank, FSB* v. *Vinson*, 477 U.S. 57, 63-64 (1986) (prohibition against sex discrimination added to Title VII "at the last minute on the floor of the House of Representatives" so that "we are left with little legislative history to guide us in interpreting the Act's prohibition against discrimination based on 'sex'").

[6] See *Doe* v. *City of Belleville*, No. 94-3699, 1997 WL 400219, at *5, *8 (7th Cir. July 17, 1997) (expressly rejecting blanket prohibition against same-sex sexual harassment claims under Title VII); *Fredette* v. *BVP Management Assoc.*, 112 F.3d 1503, 1510 (11th Cir. 1997) (same); *Yeary* v. *Goodwill Indus.-Knoxville, Inc.*, 107 F.3d 443, 448 (6th Cir. 1997) (same); *Wrightson* v. *Pizza Hut of America, Inc.*, 99 F.3d 138, 142 (4th Cir. 1996) (same); *Quick* v. *Donaldson Co.*, 90 F.3d 1372, 1378-1379 (8th Cir. 1996) (same); *Steiner* v. *Showboat Operating Co.*, 25 F.3d 1459, 1464 (9th Cir. 1994) ("although words from a man to a man are differently received than words from a man to a woman, we do not rule out the possibility that *both* men and women * * * have viable claims against [the male supervisor] for sexual harassment"), cert. denied, 513 U.S. 1082 (1995); *Saulpaugh* v. *Monroe Community Hosp.*, 4 F.3d 134, 148 (2d Cir. 1993) (Van Graafeiland, J., concurring) ("harassment is harassment regardless of whether it is caused by a member of the same or opposite sex"), cert. denied, 510 U.S. 1164 (1994); *Morgan* v. *Massachusetts Gen. Hosp.*, 901 F.2d 186, 192 (1st Cir. 1990) (in same-sex case, court states "there is a cause of action for sexual harassment," but concludes that employee had not shown conduct was "sufficiently severe or pervasive"); *Bundy* v. *Jackson*, 641 F.2d 934, 942 n.7 (D.C. Cir. 1981) (rejecting argument that harassment of employee by homosexual supervisor of same gender is not sex discrimination and noting that "in each instance the question is * * * would the complaining employee have suffered the harassment had he or she been of a different gender?"); *Barnes* v. *Costle*, 561 F.2d 983, 990 n.55 (D.C. Cir. 1977) (noting the possibility of actionable sexual harassment where "a subordinate of either gender" is harassed "by a homosexual superior of the same gender").

The Fourth Circuit, while acknowledging that Title VII is sex-neutral, and therefore that its protection may not categorically be denied to an employee of the same sex as his or her harasser, has limited same-sex harassment claims to instances in which the harasser is a homosexual, *Wrightson* v. *Pizza Hut of America, Inc.*, 99 F.3d 138, 141-143 (1996), and precluded same-sex harassment claims where the harasser and target of the harassment are heterosexuals, *McWilliams* v. *Fairfax County Board of Supervisors*, 72 F.3d 1191, 1195, cert. denied, 117 S. Ct. 72 (1996).[7] That distinction, however, cannot be squared either with the plain text of Title VII or with the purpose underlying Title VII to provide equal employment opportunity by protecting individuals

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[7] Other circuits have recognized same-sex sexual harassment claims in cases where the harasser is homosexual and have reserved judgment on whether they would recognize such claims where a same-sex harasser was heterosexual. *Fredette*, 112 F.3d at 1507; *Yeary*, 107 F.3d at 447-448. Two circuits have held that same-sex sexual harassment claims are cognizable irrespective of the sexual orientation of the harasser. *City of Belleville*, 1997 WL 400219, at *18-*25; *Quick*, 90 F.3d at 1378-1379.

from workplace discrimination, including harassment, because of sex.

An employee can state a Title VII claim based on harassment by a supervisor (or harassment by a coworker that the employer fails to remedy) without alleging that the harassment was motivated by sexual attraction. That is clear from the Court's recognition of the types of sexual harassment at issue in *Vinson* and *Harris*. The sexual harassment alleged in *Vinson* apparently was motivated by the harasser's desire to engage in sexual intercourse with the female employee. See 477 U.S. at 60. The sexual harassment in *Harris*, however, was motivated by the harasser's apparent desire to humiliate women. See 510 U.S. at 19 (supervisor's comments to employee included: "[y]ou're a woman, what do you know," "[w]e need a man as the rental manager," calling her "a dumb ass woman"; making her and other women the target of unwanted sexual innuendos about their clothing, suggesting that she obtained business deals through sex). Also, for example, in *Quick* v. *Donaldson Co.*, 90 F.3d 1372, 1376 (8th Cir. 1996), the employee alleged that he had been subjected to repeated physical assaults wherein other heterosexual workers had grabbed his testicles and verbally harassed him. He did not allege that his harassers had made any sexual advances toward him based on their attraction to him or that they were attracted to him. He contended that because the physical harassment "was directed only at the area of male sexual organs, he would not have been subjected to it but for being male." *Ibid.* The court held that "[e]vidence that members of one sex were the primary targets of the harassment is sufficient to show that the conduct was gender based," *id.* at 1378, and found that it was

sufficient, for purposes of summary judgment, that the physical assaults had been "aimed at [the plaintiff's] sexual organs, his testicles * * * squeezed so hard on one occasion that he almost passed out from the pain," and he had been "verbally taunted," *id.* at 1379. As discussed above, a supervisor may also have personal or career-related motives for sexually harassing an employee of the same sex because of the employee's sex without being sexually attracted to that employee. See pp. 12-13, *supra*; cf. *Goodman* v. *Lukens Steel Co.*, 482 U.S. 656, 667-669 (1987) (fact that union's failure to file grievances on behalf of black workers was not motivated by animosity toward blacks, but rather by strategic decision about how to deal with employer, did not make union's differential treatment based on race any less discriminatory).

At bottom, the question under Title VII is whether the choice of the target or the manner of the sexual harassment was "because of [the employee's] sex," in that the particular employee would not have been subjected to the same harassment had he or she been of the opposite sex. Regardless of whether the underlying motive for the sexual harassment was attraction, hostility, disrespect, or benevolence, such harassment violates Title VII's "simple test" of discrimination because it would be treating that employee "in a manner which but for the person's sex would be different." *Newport News*, 462 U.S. at 683 (quoting *Manhart*, 435 U.S. at 711).[8]

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[8] In light of Congress's refusal to extend Title VII to claims based upon sexual orientation, see 142 Cong. Rec. S10,129-S10,139 (daily ed. Sept. 10, 1996) (S. 2056, a bill to prohibit employment discrimination on the basis of sexual orientation, not passed by Senate), it would be ironic if the availability of a Title VII remedy turned on the sexual orientation of the

5. The Seventh Circuit recently observed that "[a] concern that seems to have motivated a number of courts in refusing to recognize cases of same-sex sexual harassment is that courts will be deluged with complaints stemming from horseplay and rough language among men." *Doe* v. *City of Belleville*, No. 94-3699, 1997 WL 400219, at *26 (July 17, 1997). That court correctly noted, however, that "very similar concerns were expressed when courts rejected the first claims of sexual harassment brought by women." *Ibid.* We agree with the Seventh Circuit that, as with claims of opposite-sex sexual harassment, claims of same-sex sexual harassment based on the occasional off-color comment or trivial conduct will be easily distinguishable from actionable claims. As in opposite-sex cases,

> "mere utterance of an . . . epithet which engenders offensive feelings in a employee," * * * does not sufficiently affect the conditions of employment to implicate Title VII. Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation.

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harasser. Such a condition would, moreover, add significant complexity to Title VII proceedings by requiring, *inter alia*, a trial as to an alleged harasser's sexual orientation.

Harris, 510 U.S. at 21-22 (quoting in part *Vinson*, 477 U.S. at 67). The trier of fact "must determine the existence of sexual harassment in light of 'the record as a whole' and 'the totality of circumstances,' such as the nature of the sexual advances and the context in which the alleged incidents occurred." *Vinson*, 477 U.S. at 69 (quoting 29 C.F.R. 1604.11(b) (1985)).

6. Because the courts below relied on an erroneous legal standard in granting respondents summary judgment, the Court should reverse the judgment and remand the case for further proceedings. That disposition would afford the courts below the opportunity to address, in the first instance, the various evidentiary and other issues that may arise in connection with petitioner's same-sex harassment claim.

Respondents have suggested (Br. in Opp. 13-17), however, that, even under the correct standard of law, petitioner's claim must fail because the oil rig on which he worked employed only males. This, however, mistakes a challenge of proof for a statement of legal principle. Title VII protection is not denied to employees in single-sex workplaces. Regardless of the demographic makeup of a workforce, an employer violates Title VII if it discriminates against an employee because of the employee's sex.

Comparative evidence is not the sole means of establishing that an employee was treated "in a manner which but for [his] sex would be different." *Newport News*, 462 U.S. at 683 (quoting *Manhart*, 435 U.S. at 711). Indeed, in *Vinson* and *Harris*, the Court did not cite any evidence that the female employees had alleged or demonstrated that the harassing supervisor did not make similar advances to, or otherwise harass, male employees.

Discrimination can be proven through direct evidence of the employer's discriminatory bias. See *County of Washington* v. *Gunther*, 452 U.S. 161, 179 (1981) (Congress could not have intended to insulate from Title VII redress a situation in which "an employer hired a woman for a unique position in the company and then admitted that her salary would have been higher had she been male").[9] Or there may be other types of comparative evidence: suppose, for example, respondent Sundowner employed females at other locations, and it acted aggressively to stop harassment when female employees at those sites complained about sexual harassment, but it ignored petitioner's comparable complaints.

The current evidentiary record does not automatically preclude petitioner from prevailing on a claim of same-sex harassment in violation of Title VII. The Court should resolve the legal question presented, reverse the judgment below, and remand the case for the lower courts to address the matters of proof.

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[9] See generally *Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. 111, 121-125 (1985) (direct evidence used to establish that practice is discriminatory on its face under Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.*); *Price Waterhouse* v. *Hopkins*, 490 U.S. 228, 251 (1989) (prima facie case of sex discrimination is shown by evidence that officials involved in decision submitted comments that "stemmed from sex stereotypes"); *Sprogis* v. *United Air Lines, Inc.*, 444 F.2d 1194, 1198 (7th Cir.) (invalidating requirement that flight attendants be unmarried; "[n]or is the fact of discrimination negated by [airline's] claim that the female employees occupy a unique position so that there is no distinction between members of the opposite sexes within the job category"), cert. denied, 404 U.S. 991 (1971).

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted.

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